Supreme Court, U.S.
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No. _____

IN THE
**Supreme Court of the United States**

JOHN M. MCCULLOUGH, SUPERINTENDENT; THOMAS W. CORBETT, JR., ATTORNEY GENERAL; PENNSYLVANIA BOARD OF PROBATION AND PAROLE
*Petitioners*

*v.*

ROBERT DEFOY,
*Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Is a prisoner excused from exhausting habeas claims in state court where review of his claims by the state court is not clearly foreclosed?

## PARTIES TO THE PROCEEDINGS

The petitioners are John M. McCullough, Superintendent of the State Correctional Institution at Pittsburgh; Thomas W. Corbett, Jr., Attorney General of Pennsylvania;[1] and the Pennsylvania Board of Probation and Parole. Respondent is Robert DeFoy, a state prisoner.

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[1] Pursuant to Sup. Ct. R. 35.3, Attorney General Corbett has been substituted for Gerald J. Pappert, his predecessor in office.

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The decision of the Court of Appeals is reported at 393 F.3d 439 and is reprinted at Pet. App. 1a. The decision of the District Court is not reported, but is reprinted at Pet. App. 22a.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 4, 2005. A petition for rehearing was timely filed, and was denied on January 24, 2005. Pet. App. 20a-21a. This petition is being filed within ninety days thereafter.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254 provides in pertinent part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a District Court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process....

* * *

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. ...

## STATEMENT OF THE CASE

This is a habeas corpus case brought by a Pennsylvania prisoner pursuant to 28 U.S.C. § 2254. The respondent, Robert DeFoy, is a convicted sex offender. He claims that he was precluded from participating in a sex offender treatment program because he refuses to admit that he committed the offenses; and that his failure to participate in the treatment program has in turn caused him to be denied parole. This, he claims, violates his Fifth Amendment right against compelled self-incrimination. The Respondent has never, however, presented this claim to any Pennsylvania court.[2]

The District Court dismissed the petition for failure to exhaust state remedies, but the Court of Appeals reversed, holding that respondent need not present his claim to the state courts because it was not clear whether those courts would entertain respondent's claims. The Court should review this case to decide whether this approach comports with the habeas statute's goals of comity and deference to the state courts, and to resolve the conflict which the Third Circuit's decision reflects.

1.a. The statute governing habeas corpus review of state custody, 28 U.S.C. § 2254, specifies that the writ "shall not be granted" 28 U.S.C. § 2254(b)(1), unless the applicant "has exhausted the remedies available in the courts of the state" 28 U.S.C. §

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[2] DeFoy's habeas petition contained several other claims, some of which he had attempted to present to Pennsylvania's Commonwealth Court by appealing from his parole denial – a procedurally improper attempt which Commonwealth Court dismissed. Pet. App. 26a. The Fifth Amendment claim, however, was never presented to any state court in any form. Pet. App. 34a.

2254(b)(1)(A) or "there is an absence of available state corrective process" 28 U.S.C. § 2254(b)(1)(B)(i), or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B)(ii). Otherwise, the law states, "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the state to raise, by any available procedure the question presented." 28 U.S.C. § 2254(c).

If the state courts have ruled on an issue, the statute requires that the federal courts accord the rulings deference, requiring that the writ "shall not be granted with respect to any claim that was adjudicated on the merits in State Court proceedings," unless the state judgment is contrary to or an unreasonable application of "clearly established federal law" as determined by the Supreme Court of the United States" or was "based on an unreasonable determination of the facts in light of the evidence" addressed in the state proceedings. 28 U.S.C. § 2254(d).

b. Pennsylvania law is unclear whether there exists an "available state corrective process" through which a Pennsylvania court could entertain respondent's Fifth Amendment claim. No Pennsylvania Court has directly addressed this issue. The general rule in Pennsylvania is that parole decisions are not subject to judicial review, *Rogers v. Com. Bd. of Probation and Parole*, 724 A.2d 319, 323 (Pa. 1999), but the Pennsylvania Supreme Court has also said that a disappointed applicant for parole "may be entitled to pursue allegations of constitutional violations against the Parole Board through a writ of mandamus" filed in Pennsylvania's Commonwealth Court. *Id.*, at 323, n.5.

Two years later, in *Coady v. Vaughn*, 770 A.2d 287 (Pa. 2001), the court held that a prisoner could indeed bring such an action to assert a claim that changes in

the Parole Act violated his rights under the Ex Post Facto Clause.[3] *Id.*, at 290. Citing *Rogers*, however, the court noted that "[a]bsent a change in the statutes governing parole ... denial of parole would generally constitute a discretionary matter that is not subject to review." 770 A.2d at 290.

Since *Coady*, the court has reviewed *ex post facto* challenges involving the denial of parole on a number of occasions. *See Winklespecht v. Pennsylvania Board of Probation and Parole*, 813 A.2d 688 (Pa. 2002); *Finnegan v. Board of Probation and Parole*, 838 A.2d 684 (2003); *Hall v. Pennsylvania Board of Probation and Parole*, 851 A.2d 859 (2004); *Cimaszewski v. Board of Probation and Parole*, 868 A.2d 416 (Pa. 2005). The court has not had occasion to clarify whether judicial review may be had of constitutional claims other than those premised on *ex post facto* violations. Pennsylvania's Commonwealth Court, however, has in fact entertained such claims, and decided them on the merits, on a number of occasions since the Supreme Courts' *Coady* decision. *See Evans v. Bd. of Probation and Parole*, 820 A.2d 904 (Pa. Cmwlth. 2003); *Voss v. Bd. of Probation and Parole*, 788 A.2d 1107 (Pa. Cmwlth. 2001).

2. The District Court dismissed respondent's petition, without prejudice, for failure to exhaust the remedies available to him in the state courts. Respondent argued that no such remedy existed, but the District Court, surveying Pennsylvania case law, disagreed.[4] The District Court relied primarily on the

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[3] In *Coady*, the Pennsylvania Supreme Court was responding to questions certified to it by the Third Circuit.. *See Coady v. Vaughn*, 251 F.3d 480, 489 (3d Cir. 2001).

[4] The District Court adopted as its own the report and recommendation of the magistrate judge to whom the case had been referred. Pet. App. 22a-23a.

Pennsylvania Supreme Court's decision in *Coady v. Vaughn*, *supra*. Pet. App. 29a-31a. Respondent argued that *Coady* was limited to *ex post facto* challenges, but the District Court noted that, in at least one case decided after *Coady*, Commonwealth Court had entertained a non-*ex post facto* claim on the merits. Pet. App. 31a-32a, *citing Evans v. Bd. of Probation and Parole*, *supra*.

Accordingly, the District Court concluded that "it appears that the Commonwealth Court will, in fact, review on a petition for writ of mandamus challenges to the constitutionality of the [Parole] Board's actions other than *ex post facto* claims." Pet. App. 33a. The District Court conceded that reasonable jurists might disagree with this conclusion, Pet. App. 35a, and acknowledged that "this case presented a situation not clearly covered by past cases." Pet. App. 28a. But the District Court applied the well-established rule that "in cases where there is any doubt about the availability of a state remedy, the claims must be dismissed." Pet. App. 34a, *quoting Coady v. Vaughn*, 251 F.3d at 489.

3.a. On appeal,[5] a divided panel reversed the District Court. The panel majority, reviewing the same case law as had the District Court, reached the opposite conclusion. The majority acknowledged that the Pennsylvania Supreme Court had noted that "mandamus '*may* be available to compel the Parole Board to conduct a hearing or to apply the correct law,'" Pet. App. 9a, *quoting Rogers v. Bd. of Probation and Parole*, 724 A.2d at 323 n.5 (Pa. 1999) (emphasis added by the panel), but noted that *Rogers* was not a "conclusive and final clarification of the issue." Pet. App. 9a. As the panel majority put it, "saying something

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[5] The District Court granted DeFoy a certificate of appealability on the exhaustion issue as to those claims not premised on the Ex Post Facto Clause. Pet. App. 35a, 23a.

'may' be available is not the same thing as saying something 'is' available." Pet. App. 9a.

The panel majority likewise acknowledged the Pennsylvania Supreme Court's decision in *Coady* permitting mandamus actions to resolve *ex post facto* claims. *Coady* too, however, was "not conclusive" on the issue before the Court, Pet. App. 7a, and the majority thought that *Coady* would not cover DeFoy's Fifth Amendment claim. To the contrary, '[w]e . . . read *Coady's* holding narrowly, applying only to *ex post facto* claims." Pet. App. 11a.

Rather, the panel majority relied on *Weaver v. Bd. of Probation and Parole*, 688 A.2d 766 (Pa. Cmwlth. 1997), a pre-*Rogers*, pre-*Coady* decision from Commonwealth Court which held that mandamus was not available to review a Fifth Amendment claim similar to DeFoy's. Pet. App. 7a-8a, 10a-11a. The majority acknowledged that *Weaver* was itself contradicted by a later Commonwealth Court decision, *Myers v. Ridge*, 712 A.2d 791 (Pa. Cmwlth. 1998), which anticipated *Coady* by holding that mandamus was available to review claims of constitutional or statutory violations. Pet. App. 8a-9a. Nevertheless, the majority believed that "*Weaver* . . . is the best indication of how the Pennsylvania Supreme Court would resolve the issues raised by DeFoy." Pet. App. 10a. Thus, in the majority's view, "mandamus is not available for Pennsylvania state prisoners seeking to challenge the denial of their parole on constitutional grounds other than the *ex post facto* clause." Pet. App. 12a.

b. Judge Weis concurred in the result. He pointed out that "no subsequent opinion by [the Pennsylvania Supreme Court] has expressly confined the holding in *Coady* to preclude other constitutional challenges," Pet. App. 15a; and that the Commonwealth Court had likewise not confined *Coady* to *ex post facto* claims, Pet. App. 16a. To the contrary, in the wake of *Coady*,

Commonwealth Court had repeatedly entertained non-*ex post facto* constitutional claims and had decided them on the merits. Pet. App. 16a, *citing Voss v. Bd. of Probation and Parole, supra* and *Evans v. Bd. of Probation and Parole, supra.* Judge Weis therefore concluded that "Pennsylvania law provides a procedure through which DeFoy may present his claim to the state courts . . . ." Pet. App. 13a.

Judge Weis thought, however, that respondent should be excused from exhausting those remedies because "on several occasions, Commonwealth Court has denied claims similar to DeFoy's on the merits." Pet. App. 13a.

## REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals, which excuses a habeas petitioner from exhausting state remedies by resolving ambiguities in state law *against* state court review, displaces the state courts from the role Congress meant them to have in resolving the constitutional claims of state prisoners, and is at odds with decisions of this Court and the courts of other circuits. The Court should review this case to resolve this conflict and to clarify the respective roles of the state and federal courts in habeas practice.

### I. The Court of Appeals' decision conflicts with the holdings of this and other courts, that ambiguities in issues of state law should be resolved in favor of state court review of habeas claims.

The exhaustion provisions of Section 2254 of the habeas statute embody Congress' intention that constitutional claims from state prisoners be first presented to, and decided by, state courts, and that the resulting decisions receive appropriate deference from

the federal courts. Accordingly, both this Court and the courts of appeals of other circuits have repeatedly held that doubts about the availability of state court review should be resolved in favor of such review. Under the holdings of these cases, exhaustion of state remedies has been excused (or deemed satisfied) only where it was *clear* that the state courts would refuse, or had refused, to decide the merits of a claim.

For example, in *Gray v. Netherland*, 518 U.S. 152 (1996), the Court considered whether a habeas petitioner's was procedurally barred from raising his *Brady* claims in state court, thus obviating any further need to present that claim to the state courts. The Court held that the exhaustion requirement "refers only to remedies still available at the time of the federal petition," *id.* at 161, and is satisfied "if it is *clear* that [the habeas petitioner's] claims are now procedurally barred under [state] law." *Id.* (emphasis added), *citing Castille v. Peoples*, 489 U.S. 346, 351 (1989). Similarly, where a state court's decision is "interwoven with ... federal law," but is ambiguous as to whether it rests upon state or federal law, the Court has adopted a "conclusive presumption," *Coleman v. Thompson*, 501 U.S. 722, 733 (1991) (citations omitted), that the state court resolved the merits of the federal claim, unless there is an express statement to the contrary or "the adequacy and independence of any possible state law ground is ... *clear* from the face of the opinion." *Id.* at 735 (citation omitted, emphasis added).

The Courts of Appeals have also generally required clarity. The Second Circuit, for example, has expressly rejected the approach taken by the Court of Appeals in this case. In *Cameron v. Fastoff*, 543 F.2d 971 (2d Cir. 1976), one question before the court was whether the state post-conviction statute would permit, or foreclose, raising certain constitutional claims in the state courts. The Court refused to predict what the state courts would do: "We are loathe to hold what the New York

Court of Appeals has not said, namely, that §440.10(2)(c) was intended by the New York legislature to foreclose raising, under the circumstances here presented, claimed violations of the United States Constitution in a post-conviction proceeding." 543 F.2d at 978. The court went on to note that "these important questions of New York law should be decided by the New York courts," because of the exhaustion doctrine's "deeply rooted policy of maintaining a proper balance of authority between the national and state governments in our federal system." *I bid.* Similarly, in *Thomas v. Wyrick*, 622 F.2d 411 (8th Cir. 1980), the Eighth Circuit refused to "embark on a lengthy canvass of all the relevant Missouri cases and attempt to predict" whether state procedures were available for purposes of exhaustion. 622 F.2d at 414. Such a canvass, the court said "would be no more than a forecast"; and insisted that "[w]hether a state remedy is presently available is a question of state law as to which only the state courts may speak with final authority." *Id. See also Simpson v. Camper*, 927 F.2d 392 (8th Cir. 1991) (*citing Thomas* for proposition that availability of state remedy is a question for the state courts).

Still other courts of appeals have refused to excuse exhaustion unless resort to state proceedings would be clearly futile. *See, e.g., Sherley v. Parker*, 2000 WL 1141425 (6th Cir. 2000) (unpublished opinion) (clearly futile). *Rodriguez v. Lewis*, 1989 WL 18794 (9th Cir. 1989) (unpublished opinion) (clearly futile); *Fuller v. Johnson*, 158 F.3d 903 (5th Cir. 1998) (procedural bar to claim must be firmly established and regularly followed); *Baker v. Corcoran*, 220 F.3d 276 (4th Cir. 2000) (procedural bar must be clear), *cert. denied*, 531 U.S. 1193 (2001).[6]

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[6] On the other side of the issue, closely aligned with the approach of the Third Circuit, and especially Judge Weis' concurrence, are those courts which have excused (continued...)

Even in the Third Circuit, there is a considerable body of caselaw which accords with this principle: "We do not excuse exhaustion ... unless state law *clearly forecloses* state court review of claims which have not previously been presented to a state court." *Lines v. Larkins*, 208 F.3d 153, 163 (3d Cir. 2000) (emphasis in original). *Accord, e.g., Whitney v. Horn*, 280 F.3d 240, 250 (3d Cir. 2002) (state law must "clearly foreclose" review); *Coady v. Vaughn*,[7] 251 F.3d 480, 489 (3d Cir. 2001) (same); *Lambert v. Blackwell*, 134 F.3d 506, 517-519 (3d Cir. 1998) (petitioner must be "*clearly* precluded" from review) (emphasis in original); *Banks v. Horn*, 126 F.3d 206, 211 (3d Cir. 1997) ("clearly precluded").

But in this case, the Court of Appeals did just the opposite. Rather than employing a presumption in favor

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exhaustion because of their prediction that a petitioner will lose in state court on the merits of his federal claims. *See, e.g., Allen v. Atty. Gen. of the State of Maine*, 80 F.3d 569 (1st Cir. 1996). These decisions, of course, thwart congressional intent as surely as the Third Circuit's does, as Congress intended that the state courts have the first chance to rule on the merits of all claims, state and federal, and that the federal courts in considering a habeas petition, defer to those judgments except in very limited circumstances. 28 U.S.C. § 2254(d). Obviously, the congressional intent is defeated if federal courts refuse to wait for the state courts to rule on the merits, either by assuming that a state remedy is unavailable or by assuming that a habeas petitioner will lose on the merits in state court.

[7] In *Coady*, when the court was in doubt as to the state of Pennsylvania law, it certified its questions to the Pennsylvania Supreme Court, and that court answered them. *See Coady v. Vaughn*, 770 A.2d 287 (Pa. 2001). In this case, for reasons it did not explain, the Court of Appeals eschewed this procedure in favor of its own resolution of this doubtful point of Pennsylvania law.

of state court review, the Court of Appeals exploited an ambiguity in state law to preclude such review. This decision cannot be reconciled with the decisions cited above, and the Court should review this case to resolve this conflict. This Court's intervention is especially needed since, as we now discuss, the Court of Appeals' misunderstanding of Pennsylvania law cannot readily be corrected by the Pennsylvania courts.

## II. It is unlikely that the Pennsylvania courts will ever have the opportunity to review and, if necessary, correct the Court of Appeals' holding on Pennsylvania law.

The problems caused by a federal court's erroneous decision on a point of state law — say, in a diversity matter — can ordinarily be resolved without the intervention of this Court. State courts, in the nature of things, have frequent opportunities to address issues of state law; and when a federal court decides such an issue incorrectly, we can reasonably assume that, sooner or later, the courts of the affected State will be able to correct the federal court's mistake with an authoritative decision of their own. In the meantime, the federal court's state-law decision will likely affect few beyond the immediate parties to the case it decided.

That, however, is not the case here. This case arises not in diversity but in habeas, and the very nature of the Third Circuit's holding — that no state remedy need be sought because none exists — works to deprive the Pennsylvania courts of any future opportunity to address the issue. Those habeas petitioners whom the Third Circuit's decision now permits to bypass the state courts, are of course likely to do just that. As a result, the Pennsylvania courts will be unable to correct any misreading of state law, simply because the Third Circuit's decision makes it unlikely that the issue will ever again come before them. The Third Circuit's decision is thus all too likely to become a self-fulfilling

prophecy, permanently depriving the Pennsylvania courts of the opportunity to review a whole class of habeas claims. The Third Circuit's decision short-circuits the usual give and take between state and federal courts on issues of state law, making it necessary for this Court to step in.

## III. The Court of Appeals' decision, which displaces the Pennsylvania courts from an entire class of habeas claims, implicates fundamental principles of federalism and comity which Congress sought to protect in the habeas statute.

The exhaustion requirement codified in § 2254(b) is not merely a rule of procedure, but a reflection of fundamental structural principles governing the relationship between the state and federal judiciaries. As the Court said over a century ago, the exhaustion requirement recognizes that "the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution. *Ex parte Royall*, 117 U.S. 241, 251 (1886). Thus, "[t]he exhaustion doctrine is principally designed to protect the states' role in the enforcement of federal law and prevent disruption of state judicial proceedings," *Rose v. Lundy*, 455 U.S. 509, 518 (1982), because "it would be unseemly . . . for a federal . . . court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Ibid., quoting Ex parte Royall*, 117 U.S. at 251.

Section 2254's exhaustion requirement thus serves to "minimize friction between our state and federal systems" by ensuring that state courts have "an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (per curiam). It ensures that claims presented to the federal courts "will more often be accompanied by a complete factual record to aid the

federal courts in their review." *Rose v. Lundy*, 455 U.S. at 519. And it ensures that the decision of state courts will receive the respect due to courts which are "equally bound" with the federal courts to protect constitutional rights. *See* 28 U.S.C. § 2254(d), (e) requiring deference to both legal and factual determination of state courts). The Court has repeatedly recognized the principles of comity, federalism and judicial efficiency which underlie the exhaustion requirement. *See, Rose v. Lundy, supra*; *Duckworth v. Serrano, supra.*

The Court of Appeals' decision exempts an entire class of cases from § 2254's exhaustion requirement. As to these cases, the panel's decision displaces the state courts from the position which Congress intended they occupy as not just the first, but the primary, arbiters of federal constitutional claims from state prisoners. *See* 28 U.S.C. § 2254(d), (e) (deference to state court determinations). It deprives federal courts of the "complete factual record" which state proceedings can be expected to produce. *Rose v. Lundy*, 455 U.S. at 519. And it will exacerbate "friction between our state and federal systems" by depriving the state of "an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Duckworth v. Serrano*, 454 U.S. at 3.

The impact of the Court of Appeals' decision thus extends well beyond the fate of one prisoner's parole application, and well beyond the immediate parties to this case, to affect the ongoing relationship between the federal and state judicial systems, and warrants review of the case by the Court.

## CONCLUSION

The Court should grant the writ.

Respectfully submitted,

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